IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.S.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

FRIDAY, THE 25TH MAY 2007 / 4TH JYAISHTA 1929

MFA. No. 565 of 2003(A)

WCC.211/1999 of W.C.C.,THRISSUR
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APPELLANT: SECOND OPPOSITE PARTY:

THE ORIENTAL INSURANCE CO. LTD.,
THRISSUR, REPRESENTED BY ITS ASSISTANT MANAGER,
REGIONAL OFFICE, ERNAKULAM NORTH, KOCHI-18.

BY ADV. SRI.GEORGE CHERIAN (THIRUVALLA)
SRI.ALEXY AUGUSTINE

RESPONDENTS: APPLICANT/FIRST OPPOSITE PARTY:
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1. K.V.JOSEPH, S/O. VAREED,
KANAKAPPADAM HOUSE, KURIACHIRA, THRISSUR DISTRICT.

2. KRISHNAMOORTHY,
VADAMMEPURATH HOUSE, POONKUNNAM, THRISSUR.

BY ADV. SRI.B.JAYASANKAR
SRI.P.K.SAJEEV

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 04/04/2007, THE COURT ON 25/05/2007 DELIVERED THE FOLLOWING:

K.S. RADHAKRISHNAN,
THOTTATHIL B. RADHAKRISHNAN
&
M.N. KRISHNAN, JJ.

M.F.A. No 565 of 2003

Dated: 25th May, 2007.

JUDGMENT

K.S. Radhakrishnan, J.

The question that is referred to the Full Bench for consideration is how far the notional extension theory could be applied so as to make the Insurance company liable to compensate the victim arising out of the use of the motor vehicle even if it is established that the accident occurred during the course of his employment?

2. First respondent filed an application under Section 22 of the Workmen's Compensation Act, 1923 claiming compensation for the personal injuries sustained by him during the course of his employment. First respondent was employed by the second respondent as driver of a tempo van bearing registration number KRU 2129. On 15.05.1999 first respondent was driving the tempo van from Sakthan Thampuran market to Pattambi and at about 6.15 P.M when he reached Pattambi he got down from the tempo van for

unloading the goods, while so a dog bit on the left hand and while attempting to escape from further dog bite he fell down and sustained the following injuries, viz., fracture II metacarpal shaft (left) and injuries on other parts of the body. He was admitted to the Jubilee Mission Hospital, Thrissur. Later he was examined by Assistant Professor of Orthopaedic, Medical College Hospital, Thrissur. First respondent was earning monthly wages of Rs 2,000/- and was aged 55 years at the time of accident. Vehicle was insured with the appellant at the time of the accident. First respondent then preferred application for compensation of Rs 1,62,672/-.

3. The owner of the vehicle, though appeared in person, did not file any written statement. Insurance Company disputed the claim and submitted that the alleged incident had occurred when the vehicle was not under use and also not during the course of employment. Commissioner for Workmen's Compensation after considering the oral and documentary evidence came to the conclusion that the first respondent was employed in the vehicle for performing his duty as driver and the accident had occurred during the course of employment and by the use of the vehicle as driver or workman under sub-section (1)(n) of Section 2 of the Workmen's

Compensation Act and that there was employer-employee relationship between the appellant and the first respondent. Application was therefore allowed awarding compensation of Rs 42,804/- with interest at 12% per annum from the date of filing of the application. It was also held that the vehicle involved in the accident was validly insured with the Insurance Company at the time of the accident. Therefore, Insurance company is liable to indemnify the owner of the vehicle and the company is liable to pay the compensation. Application was disposed of accordingly. Aggrieved by the same, insurance company has preferred the present appeal.

4. Sri George Cherian, counsel appearing for the appellant, submitted that the accident occurred not during the course of employment and hence the notional extension theory cannot be extended to the facts of this case and that the vehicle was stationary and was not under use and hence the Insurance Company cannot be made liable. Counsel also submitted that even if the contention of the first respondent that the accident has occurred during the course of employment is accepted, the Insurance Company is not liable to pay the amount since it is not an incident

involving the motor vehicle. Counsel appearing for the claimant submitted that the accident occurred during the course of employment as well as when the vehicle was under use. Counsel placed reliance on the decision in Oriental Insurance Co. Ltd. v. Thankappan (2005 (3) KLT 480) and submitted that in any view of the matter the incident occurred after the vehicle was stopped for unloading the goods and the same was during the course of employment and extension theory be applied to the facts and circumstances of the case.

5. Notional extension, casual connection, reasonably incidental theories etc. have been elaborately considered by the three Judges bench of the Supreme Court in Regional Director, E.S.I. Corporation v. Francis De Costa (1996) 6 S.C.C. 1). That was a case where employee while going to the place of employment met with an accident at a place which was about only one kilometre away from the factory. The accident occurred at 4.15 P.M while his duty shift was to commence at 4.30 P.M as a result of which, employee's collar bone was fractured. The question arose whether the said injury amounted to employment injury within the meaning of Section 2 (8) of the Employees' State Insurance Act, 1948 entitling the employee to

claim disablement benefit. The Supreme Court answered the question in the negative and held that in order to succeed in the claim to disablement benefit, the employee must prove that the injury he had suffered arose out of and was in the course of his employment. Both the conditions will have to be fulfilled before he could claim any benefit under the Act. The injury suffered by the employee in that case did not arise in any way out of his employment and unless it can be said that his employment began as soon as he set out for the factory from his home, it cannot be said that the injury was caused by an accident "arising out of his employment". The court opined that a road accident may happen anywhere at any time. But such accident cannot be said to have arisen out of employment unless it can be shown that the employee was doing something incidental to his employment. While holding so, the apex court also referred to its earlier decision in Saurashtra Salt Manufacturing Company v. Bai Valu Raja (AIR 1958 S.C. 881). In that case the Supreme Court held as follows:

> "A workman is not in the course of his employment from the moment he leaves his home and is on his way to his work. He certainly is in the course of his employment if he reaches the place of work or a point or an area which comes within the

> theory of notional extension, outside of which the employer is not liable to pay compensation for any accident happening to him."

Referring to the dictum laid down in R v. National Insurance Commissioner ex p Michael (1977) 2 All. E.R 420) the court took the view that the test of what was "reasonably incidental" to employment, may be extended even to cases while an employee is sent on an errand by the employer outside the factory premises. But in such cases, it must be shown that he was doing something incidental to his employment. Reference may also be made to another recent decision of the apex court in Jyothi Ademma v. Plant Engineer, Nellore (2006) 5 S.C.C. 513) wherein the apex court after referring to Section 3 (1) of the Workmen's Compensation Act, 1923 held as follows:

> "Under Section 3 (1) it has to be established that there was some casual connection between the death of the workman and his employment. If the workman dies as a natural result of the disease which he was suffering or while suffering from a particular disease he dies of that disease as a result of wear and tear of the employment, no liability would be fixed upon the employer. But if the employment is a contributory cause or has accelerated the death, or if the death was due not only to the disease but also the disease coupled with the employment, then it can be said that the death arose out of the employment and the employer would be liable."

6. Apex court in Shivaji Dayanu Patil v. Smt Vatschala Uttam More (AIR 1991 S.C. 1769) interpreted the provision in Section 92A of the old Motor Vehicles Act and also the expression used "use of motor vehicle" which occur both when the vehicle is in motion and when it is stationary. The word "use" has a wider connotation to cover the period when the vehicle is not moving and is stationary and the use of a vehicle does not cease on account of the vehicle having been rendered immobile on account of a break-down or mechanical defect or accident. Reference can also be made in this connection to a Bench decision of this court in Mary v. Mathew (2003) (1) KLT 592) wherein this court took the view that any accident in respect of a stationary vehicle shall be proximate to the use of the vehicle. Reference is also made to another Bench decision of this court in Babu v. Ramesan (1995 (2) KLT 300). In that case vehicle was stationary and the employee used a rope for tying the load on the vehicle. Vehicle touched electricity wire and sustained burn injuries. The court took the view that the test should be whether the accident was reasonably proximate to the use of a motor vehicle, whether or not the motor vehicle was in motion then. Claim was allowed and the insurance

company was directed to pay the amount payable under section 140 of the Act. A bench of this court in New India Assurance Co. Ltd.v. Lakshmi (2000) 3 KLT 80) took the view that the injury sustained on account of a fertilizer bag falling upon in the process of unloading it from a stationary lorry is during the course of use of a motor vehicle.

7. The Division Bench in its reference order referred to the bench decision in Oriental Insurance Co. Ltd. v. Thankappan (2005 (3) KLT 480). That was a case where the conductor while taking bath drowned and this court held that the conductor was taking bath as part of preparation for going to work as conductor and insurance company was liable to due notional extension of employment. We find ourselves unable to subscribe to that view and in our view the notional extension theory cannot be extended thus far. Apex court in various decisions such as Mackinnon Mackenzie and Co. Pvt. Ltd v. Ibrahim Mahommad Issak (AIR 1970 S.C. 1906) while interpreting Section 3 of the Workmen's Compensation Act took the view that the words “arising out of employment” are understood to mean that “during the course of the employment, injury has resulted from some risk incidental to the

duties of the service which, unless engaged in the duty owing to the master it is reasonable to believe the workman would not otherwise have suffered. The court held that there must be a casual relationship between the accident and the employment. If the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed unless of course the workman has exposed himself of an added peril by his own imprudent act.

8. We are of the considered view that in the facts and circumstances of the case, the claimant has satisfied all the tests viz., notional extension, casual connection and reasonably incidental to establish his claim, but we make it clear that ultimately everything turns on the facts and circumstances of each case. Facts of this case would clearly indicate that the claimant got down from the motor vehicle so as to unload the goods and it was at that juncture he had sustained dog bite and ran away to escape from further bite and then fell down and sustained injuries. He got out of the vehicle during the course of his employment so as to unload the goods. Goods loaded on the vehicle were to be unloaded and therefore the vehicle was under use. Compensation can be claimed when the accident occurred not only when the vehicle was moving but also when it was stationary. Use of the motor vehicle would clearly establish that since goods were loaded necessarily it had to be unloaded and it is for unloading the goods the claimant got out of

the motor vehicle. Therefore so far as the claimant is concerned he sustained injuries when the motor vehicle was under use. Workmen's Compensation Commissioner has allowed the claim since the vehicle has been insured with the appellant insurance company. Vehicle was in use and the accident occurred during the course of employment. On both counts, in our view, claimant is entitled to succeed and the Commissioner has rightly awarded the compensation. Appeal therefore lacks merits and the reference is answered accordingly.

Sd/-
K.S. RADHAKRISHNAN,
Judge

Sd/-
THOTTATHIL B. RADHAKRISHNAN
Judge

Sd/-
M.N. KRISHNAN
Judge

25/05/2007
en/

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